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# In the Supreme Court of the United States.

OCTOBER TERM, 1916.

LOUISVILLE BRIDGE COMPANY, Appellant,
*v.*
THE UNITED STATES.
No. 540.

*APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE WESTERN DISTRICT OF KENTUCKY.*

## BRIEF FOR THE UNITED STATES.

### STATEMENT OF THE CASE.

The case turns on an order of the Secretary of War to compel certain changes in the structure of a railroad bridge erected by the appellant under acts of Congress. An injunction was asked by the Government to prevent action in disregard of the Secretary's order. The district court granted the relief sought (233 Fed. 270) and an appeal from the decree is prosecuted directly to this court (R. 25).

#### THE STATUTES.

The bridge company operates under a charter of the State of Kentucky granted by act of the legislature of March 10, 1856, Acts of 1855–56, vol. 2,

p. 426. The second section of the act contains these words:

> *Provided,* That said bridge shall be constructed so as not to obstruct navigation further than the laws of the United States and the decisions of the Supreme Court of the United States shall hold to be legal.

Previous to the charter, the act of Feb. 14, 1856, (Acts of Kentucky, 1855–56, vol. 1, p. 15) had provided:

> SEC. 1. That all charters and grants of, or to corporations, or amendments thereof, and all other statutes, shall be subject to amendment or repeal at the will of the legislature, unless a contrary intent be therein plainly expressed: * * *.

The acts of Congress under which the bridge was erected, that of July 14, 1862, ch. 167, 12 Stat. 569, and its amendment of February 17, 1865, ch. 38, 13 Stat. 431, are printed on pages 71 to 75 of appellant's brief. The Secretary of War issued the order here in question under section 18 of the act of March 3, 1899, ch. 425, 30 Stat. 1121, 1153, printed in appellant's brief, page 4.

### THE FACTS.

The bridge crosses the Ohio River from Kentucky into Indiana at the city of Louisville, and is known as the Ohio Falls Bridge. In the stipulation of facts it is agreed that as erected in 1870 it not only fulfilled but exceeded the requirements of the then existing acts of Congress in relation thereto. A

board of engineers making a report in 1871 to the Secretary of War, which was ultimately embodied in a report to Congress, stated that the bridge was a first-class structure exceeding specifications, and that no changes in it were recommended. (R. 10.)[1]

A canal runs parallel to the river at this point and the canal as well as the river is spanned by the bridge. The acquisition of the canal by the United States in 1880 resulted in improvements in its navigation and attracted the traffic from the river. Navigation consequently has continually increased in the canal since that date and decreased in the river. This change will be accentuated upon the completion of further improvements now undertaken. (R. 10.)

Under orders of the Secretary of War, a board of Army engineers called a public hearing in October, 1914, at Louisville, to take evidence as to the effect of the bridge upon navigation. (R. 3.) The bridge company was notified of this hearing and was

[1] It may be pertinently remarked, however, that the board was not entirely oblivious to the fact that changes might be necessary in this bridge in the immediate future. The next paragraph of the report is as follows:

"If it should be found by experience that, owing to the peculiar location of this bridge, the channel space on the Indiana side can not be safely run by coal tows, then a still wider opening will be necessary. Present difficulties, however, may possibly be due to a lack of experience. Should it be found, however, that there are inevitable dangers due to this exceptional location, which no amount of experience can avoid, it will be manifestly necessary to widen this span to 500 feet, or in some manner to modify existing conditions so as to facilitate the passage of the present opening." (Senate Ex. Doc. No. 1, 42d Cong., spec. sess., p. 27.)

represented, but limited its participation in the proceedings to a protest that no action affecting the bridge could be taken without compensation for the damages occasioned. (R. 10). The board of engineers after consideration recommended certain changes in the bridge to obviate its obstruction to navigation. Pursuant to this recommendation the Secretary of War in a letter to the bridge company directed changes both in that portion of the bridge which crossed the river and in that over the canal. (R. 3.) It is stipulated by counsel that this order complied exactly with the requirements of section 18 of the act of March 3, 1899. (R. 9.)

The superstructure of the bridge had been in continual use since its erection and was badly in need of repair. The bridge company, not intending to comply with the order of the Secretary, answered it by an asseveration of the right to the maintenance of the pier as originally erected, and served notice of its intention to renew the superstructure as then standing. (R. 4.)

The three years allotted by the Secretary of War to effectuate the changes specified have not elapsed. The renewal of the bridge, however, on the old plans and in defiance of the order would render ineffectual the remedies for its ultimate enforcement. Upon that basis resort was had to this action for an injunction, the case being submitted upon the bill and answer, and an agreed statement of facts. (R. 11.)

### THE ISSUE.

There is but one question involved, namely: Is the order of the Secretary of War directing material alterations in the bridge valid although no compensation is given for the expense involved? The only disputable points as to the validity of the order are, first, whether the act of March 3, 1899, should be construed to apply to this particular bridge so as to authorize the issuance of the order against it; and second, whether the act if so construed is to that extent constitutional.

## ARGUMENT.

### I.

### THE ACT OF MARCH 3, 1899, AUTHORIZING THE SECRETARY OF WAR TO COMPEL ALTERATION IN BRIDGES, IS APPLICABLE TO THE OHIO FALLS BRIDGE.

The unequivocal wording of the statute resolves this question. In terms, it applies to—

> *any* railroad or other bridge *now constructed*, or which may hereafter be constructed over *any* of the navigable waters of the United States. (Italics ours.)

The navigability of the Ohio is, of course, undisputed. The scope of the statute is universal; it makes no exception of bridges erected under previous acts of Congress. *United States* v. *Portale*, 235 U. S. 27, 30. It is enough that the bridge be erected over navigable water and that it unreasonably obstruct navigation.

Light is cast upon the scope of the act of March 3, 1899, by its antecedents. The first general legislation of Congress upon this matter was the act of July 5, 1884 (23 Stat. 123, 148) affecting the owners of—

> any railroad or other bridge now or hereafter to be constructed over any of the navigable waters of the United States, *under authority of the United States or of any State or Territory.* (Italics ours.)

By section 8 the Secretary of War was authorized to compel aids to navigation to be erected near such bridges at the expense of the owners. The next statute is in more direct line with the act of March 3, 1899. It first gave the Secretary of War power to compel alterations in existing bridges. (Aug. 11, 1888, ch. 860, 25 Stat. 400–424.) The bridges comprised within its scope were defined in language identical with that employed by the act of 1899. The words "under authority of the United States or of any State or Territory," used in the 1884 statute, are omitted. There is no indication, however, of any intent to contract the scope of the act thereby, and the omission was evidently made because of the realization that the words were restrictive rather than extensive in their effect. The general application of the statute is shown in the report of the House committee on the bill (H. R. Report No. 1495, 50th Cong., 1st sess.) as follows:

Section 9 deals with railroad and other bridges which obstruct the free and easy navigation of the waterways of the Government, and provides how the evil may be remedied.

The next session of Congress passed an act extending the exercise of Federal authority still further. (Sept. 19, 1890, ch. 907; 26 Stat. 426, 453.) Section 4 of the act carried over the provisions of section 9 of the preceding statute, using identical words as to the bridges comprised, but requiring that they should be an "unreasonable" obstruction as a condition to alteration, and that notice and an opportunity to be heard should be given the owners before enforcement of the Secretary's orders. The previous penal provisions were made more stringent.

The act of March 3, 1899 (ch. 425; 30 Stat. 1121), involved in the instant case, is a progressive extension of the act of 1890. One feature, more than in any preceding act, confirms the interpretation asserted by the Government. Sections 9, 10, and 12 forbid the erection of bridges over navigable water without the consent of Congress and the approval of the Secretary of War. Bridges hereafter constructed must have congressional authority. It should therefore be evident that section 18, authorizing proceedings against *any railroad or other bridge now constructed or which may hereafter be constructed* refers to bridges constructed under congressional authority as well as those constructed without it.

The whole trend of this legislation is toward assumption of a greater Federal right. Previous decisions of this court reflect the intent of Congress (in section 18) to reach every bridge obstructing navigation. It is held to apply to bridges previously constructed under State authority. *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177. Moreover, it applies to a bridge erected under congressional authority. *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194. The statute in the case last cited was similar to those under which the Ohio Falls Bridge was built, except that it specifically reserved the right to alter and amend. But these words affect only the *power* of Congress over the bridge and not the *intent* that the bridge be included or excluded in the subsequent statute. The failure to mention the Ohio Falls Bridge explicitly in the act of 1899 can not limit the plainly expressed congressional plan for allaying every obstruction to navigation by any bridge.

The interpretation contended for is in entire harmony with the rule "*generalia specialibus non derogant.*" That doctrine is merely a guide to the ascertainment of the legislative intent and without application where the more general statute is "so broad in its terms and so clear and explicit in its words as to show that it was intended to cover the whole subject." *Frost* v. *Wenie*, 157 U. S. 46, 58. If the intent be clear, the special statute is abrogated by the general terms of the later statute regardless

of this doctrine and the presumption against implied repeals. Sutherland, Statutory Construction, 2 ed., sec. 276; *The Paquete Habana*, 175 U. S. 677; *King* v. *Cornell*, 106 U. S. 395.

In wording and history, therefore, the statute shows its application to the Ohio Falls Bridge.

## II.

### THE ACT OF 1899 IS NOT UNCONSTITUTIONAL AS APPLIED TO THE OHIO FALLS BRIDGE.

Intimately related questions have already been before this court. The basic point—the plenary power of Congress to improve navigable waters in the interests of commerce—has been settled, as has also the general constitutionality of section 18 of the act of March 3, 1899, empowering the Secretary of War, to compel without compensation the alteration of State-authorized bridges obstructing navigation, although no right to alter, amend, or repeal was reserved. *Union Bridge Co.* v. *United States*, 204 U. S. 364; *Monongahela Bridge Co.* v. *United States*, 216 U. S. 177. This doctrine has also been applied to a bridge erected in virtue of a congressional enactment providing "that the right to alter or amend this act * * * is hereby expressly reserved." *Hannibal Bridge Co.* v. *United States*, 221 U. S. 194.

The Ohio Falls Bridge was consented to by acts of Congress, and the phrase—"the right to alter or amend is hereby reserved"—did not appear in the consenting acts. The omission of these words, appellant contends, vests a right to the perpetual

maintenance of the bridge as erected regardless of the extent to which it chokes navigation. A very similar question was left open by this court in *United States* v. *Baltimore & Ohio R. Co.*, 229 U. S. 244, 254, which went off on *res judicata*. Appellant asserts that the question was really decided adversely to the Government in that case. (Brief, pp. 62–68.) It is inconceivable, however, that a matter of this importance should have been thus decided *sub silentio;* and the last paragraph of the opinion expressly reserves the question of the power of Congress to directly legislate on the subject of removal or alteration of the bridge. In the case at bar there is the equivalent of such direct legislation (infra, p. 30) and no question of *res judicata* is involved.

**(A) The consenting acts of Congress did not purport to create a vested right to maintain the bridge as erected.**

In construing the acts, it should be remembered that grants of franchises and privileges are to be strictly interpreted in favor of the Government. *Knoxville Water Co.* v. *Knoxville*, 200 U. S. 22; *Hamilton Gaslight & Coke Co.* v. *Hamilton City*, 146 U. S. 258. This principle was applied in *Bridge Co.* v. *United States*, 105 U. S. 470, to an act authorizing the bridging of a navigable stream. The court said (p. 480):

> Congress, which alone exercises the legislative power of the Government, is the constitutional protector of foreign and interstate commerce. Its supervision of this subject is

> continuing in its nature, and all grants of special privileges, affecting so important a branch of governmental power, ought certainly to be strictly construed. Nothing will be presumed to have been surrendered unless it was manifestly so intended. Every doubt should be resolved in favor of the Government.

With this principle in mind, an examination of the statutes authorizing this bridge will show that their language in no way negatives the full power of Congress to compel its uncompensated conformity to subsequent needs of navigation. On the contrary, this power is retained in words more effective than an express reservation of the right to alter or amend.

**1. The act of February 17, 1865 (13 Stat. 431), reserves a right to compel alteration in conformity to the changing needs of navigation.**

This statute, amendatory of that of July 14, 1862 (12 Stat. 569), extended the provisions of the previous act to the projected Ohio Falls Bridge, provided for the erection of a bridge with three draws at a height not less than fifty-six feet, and added:

> *And provided further,* That said bridge and draws shall be so constructed as not to interrupt the navigation of the Ohio River.

This proviso was enacted in the face of section 5 of the act which it amended, and which required that boats navigating the Ohio be so handled as not to interfere with the use of bridges constructed under the act—to that extent subjecting navigation to the bridge. As the failure of the first statute to take

into account the river's two channels and the parallel canal was cured by the provision in the second for a bridge with three draws, so another error was corrected by subordinating the use of the bridge to the use of the river, thus restoring navigation to its original supremacy.

This proviso renders the bridge servient not alone to the existing but also to the future needs of navigation. In *West Chicago R. R.* v. *Chicago*, 201 U. S. 506, identical words were held to have that effect. The city of Chicago, under State authority, granted a franchise for the construction of a railroad tunnel under the Chicago River. A statute then in force provided that railroads must be constructed

> upon or over any street, alley, road, or highway, or across or over any waters in this State in such manner as not to unnecessarily obstruct the public use of such street, alley, road, or highway, *or interrupt the navigation of such waters*. (Italics ours.)

Eleven years after the tunnel's completion the depth of water in the river was increased by dredging, but the presence of the tunnel at its original height impaired the benefit of the deepened channel. The city thereupon ordered it to be lowered at the expense of the railroad company, and the order was enforced by mandamus. This court said (p. 521):

> The railroad company, in consideration of certain rights and privileges granted to it by the city, undertook to construct the tunnel; and it is true that when constructed the tunnel

did not interfere with navigation; nor would it now obstruct navigation if only boats and vessels of the size and capacity in use when the tunnel was constructed were engaged in commerce on the river. But such boats and vessels are insufficient to meet the present needs of commerce at Chicago.

* * * * *

Apart from any question as to the power of the city to bargain away or surrender its authority to improve navigation and protect it against obstruction, the railroad company must be held to have accepted the ordinance and constructed the tunnel subject to the requirement that navigation should not be interrupted by it. As the present tunnel is an obstruction to the use of the river by many boats and vessels employed in commerce on the Lakes, and as, by the ordinance in question, the city did not stipulate—even if it could lawfully have stipulated—that it would not exert whatever powers it had in order to protect the free navigation of Chicago River whenever it became necessary or proper to do so, the result must be that the execution of the order to lower or remove the tunnel would not impair the obligation of any contract protected by the Constitution of the United States.

That decision overrides any expressions to the contrary by former Attorney General Moody (in 25 Ops. A. G. 194, 209), relied upon in appellant's brief (p. 57). See also *Dugan* v. *Bridge Co.*, 27 Pa. St. 303.

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If the interpretation of the act of 1865 here contended for is correct, the present case is indistinguishable from *Hannibal Bridge Co.* v. *United States, supra,* and affirmance of the judgment below can be rested on that decision without more.

Due effect must also be given to the terms under which the bridge company accepted its charter from the Legislature of Kentucky. The existing State statute (act of Feb. 14, 1856, Acts 1855–56, vol. 1, p. 15), providing that all charters should be subject to amendment or repeal at the will of the legislature, became a part of the charter. *Greenwood* v. *Freight Co.*, 105 U. S. 13. The charter itself provided that the bridge should not obstruct navigation further than the laws and decisions of the United States should deem legal. The charter is thus expressly subordinated to navigation and Federal laws affecting it, as well as to repeal or amendment at the will of the legislature.

**2. Authority granted to erect such a structure in or over navigable water is impliedly subject to the easement of navigation.**

Property situated on navigable water is weighted with a servitude for the fostering of navigation; and must suffer incidental damage inflicted from governmental enterprises developing that interest. *Bedford* v. *United States,* 192 U. S. 217; *Jackson* v. *United States,* 230 U. S. 1. This principle extends to a bridge erected over a navigable stream by Congressional authority. *St. Louis Southwestern Ry.* v.

*Board of Directors*, 125 C. C. A. 88. Access to property bordering on streams may be destroyed, *Gibson* v. *United States*, 166 U. S. 269, *Transportation Co.* v. *Chicago*, 99 U. S. 635; so the land under navigable water may be occupied or dredged away—all in the interest of navigation. *Hawkins Light House case*, 39 Fed. 77; *Scranton* v. *Wheeler*, 179 U. S. 141; *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82. Prescriptive right to maintain a structure in navigable water can not be acquired in derogation of the right of navigation. *Vooght* v. *Winch*, 2 Barn. & Ald. 662; *Olive* v. *State*, 86 Ala. 88.

Any structure erected in navigable water is built with knowledge of its peril from the paramount interest. Though lawfully erected under the common-law right of riparian ownership or by State statutory authority, it may be altered or destroyed without compensation by Federal authority. *Willink* v. *United States*, 240 U. S. 572; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251; *Monongahela Bridge* v. *United States*, 216 U. S. 177; *Union Bridge Co.* v. *United States*, 204 U. S. 364. This principle is epitomized in the Monongahela case, *supra*, as follows (p. 193):

> Although the Brownsville Bridge was originally constructed under the authority of the Commonwealth of Pennsylvania, and may not, at the date of its erection, have been an illegal structure or an unreasonable obstruction to navigation in the condition, at that time, of commerce and navigation on the Monongahela River, *the bridge must be taken as having been constructed with knowledge, on the part of*

> *all, of the paramount power of Congress to regulate commerce among the States, and subject to the condition or possibility that Congress might, at some time after its construction, and for the protection or benefit of the public, exert its constitutional power to protect free navigation as it then was against unreasonable obstructions;* that the mere silence of Congress and its failure to directly interfere and prevent the original construction of the bridge, under the authority of Pennsylvania, imposed no constitutional obligation on the United States to make compensation for subsequent changes or alterations, which the public good, in its judgment, required to be made. (Italics ours.)

The bridge erected under State authority is erected in contemplation of and subject to subsequent action by Congress in aid of navigation. Those building under Federal authority are chargeable with the same knowledge of the easement of navigation. The bridge with State authority is as lawful (*Gilman* v. *Philadelphia*, 3 Wall. 713), and as much property, within the inhibitions of the Fifth and Fourteenth Amendments, as is the bridge erected under congressional authority. The implied reservation in favor of subsequent action by Congress to promote navigation is as strong in the one case as in the other. In both instances a servitude in favor thereof is read into any authority granted to erect structures actually or potentially affecting navigation.

This is the principle underlying cases of bridges erected under congressional statutes, expressly re-

serving the right to alter and amend. Counsel relies upon those words to distinguish the cases (brief, p. 31), but analysis shows them to be immaterial. The express reservation permits repeal or amendment of the privilege granted but retains no right to take or destroy physical property. *Sinking Fund Cases*, 99 U. S. 700, 747, 748; *Greenwood* v. *Freight Co.*, 105 U. S. 13, 19; *People* v. *O'Brien*, 111 N. Y. 1. Yet the *Hannibal Bridge Case*, 221 U. S. 194, upheld the authority of the Secretary of War to compel alteration of a bridge erected under a congressional statute where the only power expressly reserved was the following:

> *And be it further enacted*, That the right to alter or amend this act, so as to prevent or remove all material obstructions to the navigation of said river by the construction of bridges, is hereby expressly reserved. (14 Stat. 244, 246.)

The power as reserved must have been exercised through repealing or amending the statute conferring the franchise. It therefore could not sustain the power to alter the physical structure of the bridge involved in that case. The court referred to this clause only in showing that the act of 1899 applied, and based the decision of the main point on the *Union Bridge Case*, 204 U. S. 364, and the *Monongahela Bridge Case*, 216 U. S. 177, where the bridges were erected under State authority and no right to alter or amend was reserved. All of these cases are basically identical to the case at bar.

**3. The statutory specifications constitute at most a revocable license to maintain the bridge at a height, width, and class of span not less effective than those prescribed.**

The argument here does not turn so much upon the question of the vested right to maintain the bridge as upon the point that there is no irrevocable privilege granted to maintain the bridge at the particular specifications adopted when it was erected. The implied reservation for alteration is not rebutted or affected by the fact that figures were fixed to which the dimensions of the bridge had to conform.

Examination of the statutes in the instant case shows that they were passed by Congress as much to prevent the erection, under State authority, of bridges improperly prejudicing navigation as to declare the legality of bridges already erected—for withholding congressional approval from bridges unless constructed according to specifications would constrain builders to satisfy those specifications. The statute rather prohibits bridges not meeting these specifications than invites the building of bridges. The charter—and hence the franchise—of the bridge company comes from the legislature of Kentucky (R. 2, 7), and the Federal act of 1862, as amended, merely recognizes the franchise and legalizes it so far as interstate commerce and navigation is concerned. No Federal right or franchise is granted. *Western Union Telegraph Co.* v. *Richmond*, 224 U. S. 160; *Williams* v. *Talladega*, 226 U. S. 404. See *Kansas Southern Ry.* v. *Kaw Valley Dist.*, 233 U. S. 75, 80. That merely a permissive privilege was

conferred is shown by the fact that the act of 1862 is almost an exact copy of the act legalizing the Wheeling Bridge. (See the *Wheeling Bridge Cases*, 13 How. 518; 18 How. 421, and sections 6 and 7 of the act of August 31, 1852, 10 Stat. 110, 112.)

In any event the specifications merely fixed a then acceptable minimum rather than one to endure for all time. This bridge company, anticipating to some extent the future needs of navigation, materially exceeded the then minimum requirements of the statutes. This in itself was a recognition that the requirements were subject to change as the conditions upon which they were based changed. The company looked to the future but did not meet the needs of a date so remote as the present.

In *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453, the gas company, under franchise, laid its pipes and mains in the streets of the city. A drainage commission, subsequently created, ordered a change in location of the pipes. Holding that the expense incurred must be met by the gas company, this court said (p. 462):

> The gas company, by its grant from the city, acquired no exclusive right to the location of its pipes in the streets, as chosen by it, under a general grant of authority to use the streets.

In *C. B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, a railroad bridge and culvert were ordered enlarged to meet the requirements of a change in the

volume of the stream passing through the culvert. With reference to the power of the State to compel the alterations, this court said (p. 586):

> When the railway company laid the foundations of its bridge in Rob Roy Creek it did so subject to the rights of the public in the use of that watercourse, and also subject to the possibility that new circumstances and future public necessities might, in the judgment of the State, reasonably require a material change in the methods used in crossing the creek with cars.

The difference between taking the franchise and compelling the bridge to conform to the public need is shown in *Grand Trunk Western Ry.* v. *South Bend*, 227 U. S. 544. While the right to destroy a franchise to lay a double track was denied, the power to compel alterations in the track was thus stated (p. 553):

> And, as in the viaduct cases, it might require these tracks to be lowered or elevated (*Chicago, B. & Q. R. R.* v. *Nebraska*, 170 U. S. 57), or, the franchise, and not the particular location, being the essence of the contract, the city, under the power to regulate, might compel the company to remove the tracks from the center to the side, or from the side to the center of the street. *New Orleans Gas Light Co.* v. *Drainage Commission*, 197 U. S. 453; *Macon &c. R. R.* v. *Mayor*, 112 Georgia, 782; *Atlantic & B. Ry.* v. *Cordele*, 128 Georgia, 293, 296; *Snouffer* v. *Cedar Rapids & M. C. Ry. Co.*, 118 Iowa, 287 (5).

This doctrine has been extended to a railroad bridge over navigable water in a situation substantially similar to that now before the court. *City of Buffalo* v. *Delaware, L. & W. R. R. Co.*, 136 App. Div. 274. (Aff'd in 204 N. Y. 562.)

While the statutes in these cases gave no specifications as to location or elevation, and the structures were erected under general authority, they were none the less legal, and it is difficult to differentiate them from those wherein the statute requires, as a condition to their legality, that they shall not fall below certain minimum requirements. They have no more a perpetual right to be maintained as originally erected in the one case than in the other.

**(B) Congress could not divest itself of power to remove such obstructions to navigation.**

Thus far we have sought to show that the special acts under which this bridge was constructed afforded it no right to be maintained in the face of adverse interests of navigation. A shorter disposition of the question lies in the rule that the trust vested in Congress to conserve navigation is inalienable.

**1. The right of navigation is an inalienable trust in Congress.**

Practically every bridge erected over navigable water constitutes some hindrance to its navigation. Unauthorized obstructions are common nuisances, and, like obstructions to public highways, subject to abatement. *State* v. *Parrott*, 71 N. C. 311; Gould,

Waters, sec. 121. But the legislature, in facilitating other public interests, may authorize and legalize structures which render navigation less free. *Wheeling Bridge Case*, 18 How. 430; *Gilman* v. *Philadelphia*, 3 Wall. 713; *Miller* v. *Mayor of New York*, 109 U. S. 385.

This legislative prerogative is derived from the power to balance the conflicting public interests, i. e., the interest of commerce on water as against bridging in the interest of commerce on land. Farnham, Waters, vol. 1, sec. 84. At the common law, however, the right of navigation takes precedence over the right of bridging. Gould, Waters, secs. 86, 88. (Quoted in 201 U. S. 524.) The former is a primary right held in trust by the Government.

The adjustment between these interests can not in the nature of things be static. When the public good demands a readjustment in the interests of navigation the fact of prior adjustment can not render the legislature powerless to make a readjustment or to restore the original situation. Congress can not embarrass the exercise of its stewardship over navigation by creating property rights, nor by any manner of contract or estoppel.

**2. No property right can avail against abatement of a bridge when declared a public nuisance by Congress.**

All property so endangering public interests as to render it a nuisance may be destroyed if need be to abate the nuisance (*Mugler* v. *Kansas*, 123 U. S.

623; *Balch* v. *Glenn*, 85 Kans. 735) even though the property is held under statutory authority and is legally held as long as that authority is unrepealed. *Stone* v. *Mississippi*, 101 U. S. 814. This is so, though the transformation into a nuisance was not occasioned by an increase in the innate offensiveness of the property, but by an increase in population of the neighborhood in which it is situated. *Fertilizer Co.* v. *Hyde Park*, 97 U. S. 659. The property rights of this bridge created under the congressional concession were subject to these universal restrictions on all property. The fact that this bridge was made a post road is immaterial, since it is a post road obstructing navigation. When it becomes a nuisance and is declared such by competent authority, the constitutional protection fails.

**3. Congress could not by contract or estoppel prevent itself from subsequently enforcing uncompensated alteration of the bridge in the interest of navigation.**

The above principles apply to the attempt to deny congressional power upon the ground that the franchise constitutes a contract or works an estoppel. The provision of the Constitution against impairing the obligation of contracts is inapplicable to the Federal Government. (Art. I, sec. 8.) But it may be contended that the contractual rights alleged to exist in the franchise are property, which can not be taken without due process.

It is axiomatic that the police power can not be contracted away. *Northern Pac. Ry.* v. *Duluth*,

208 U. S. 583; *Mugler* v. *Kansas*, 123 U. S. 623. The extent of this doctrine was illustrated in *Chicago & Alton R. R.* v. *Tranberger*, 238 U. S. 67. There a railroad under State authority erected a solid embankment across a low bottom to carry its roadbed. Twelve years afterwards a statute was passed compelling open culverts in such embankments. It was contended that this statute operated to violate its charter contract and take its property without due process. Referring to the constitutional inhibitions, this court said (p. 76):

> It is established by repeated decisions of this court that neither of these provisions of the Federal Constitution has the effect of overriding the power of the State to establish all regulations reasonably necessary to secure the health, safety, or general welfare of the community; that this power can neither be abdicated nor bargained away and is inalienable even by express grant, and that all contract and property rights are held subject to its fair exercise. *Atlantic Coast Line* v. *Goldsboro*, 232 U. S. 548, 558, and cases cited. And it is also settled that the police power embraces regulations designed to promote the public convenience or the general welfare and prosperity, as well as those in the interest of the public health, morals, or safety. *Lake Shore & Mich. Southern Ry.* v. *Ohio*, 173 U. S. 285, 292; *C. B. & Q. Ry.* v. *Drainage Commissioners*, 200 U. S. 561, 592; *Bacon* v. *Walker*, 204 U. S., 311, 317.

It is now recognized that the so-called police power is not limited to the protection of the health, morals,

and safety of the community, but extends to the general public welfare. *Bacon* v. *Walker*, 204 U. S. 311. Legislation upon such matters can not remain static but must adapt itself to the continually progressing needs of the situation.

The promotion of the interests of navigation is one of the governmental functions upon which the public weal is directly dependent. Obstructions to navigation are public nuisances and legislative control of public nuisances is a branch of the police power. In *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 264, the court stated that in the cases relied upon "the power of Congress [over navigation] was said to be analogous in its illimitable exertion to the police power." Control over navigation was said to be a branch of the police power, and a sharp limit to its alienability was set in *Illinois Central R.* v. *Illinois*, 146 U. S. 387, 459. This was the basis of the decision in *Matter of Long Sault Development Co.*, 212 N. Y. 1. A corporation was there created to develop the water power and navigation of a portion of the St. Lawrence River with the privilege of erecting dams, canals, reservoirs, power houses, locks, and a bridge. It was specifically provided, however, that the rights thus—

> granted shall never be so used as to impair or obstruct the navigation of the St. Lawrence River, but on the contrary that such navigation shall be preserved in as good condition, if not better, than the same is at present.

The act of incorporation was held unconstitutional. The court said (p. 10):

> In my opinion the legislature can not make such a contract on behalf of the State.
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> * * * * *
>
> As long as the waters are maintained as navigable they remain public waters of the State; and as long as they remain public waters of the State the State is bound to retain control over them in the public interest. "The State can no more abdicate its trust over property in which the whole people are interested, like navigable waters and soils under them, so as to leave them entirely under the use and control of private parties, except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abdicate its police powers in the administration of government and the preservation of the peace." *Illinois Central Railroad Co.* v. *Illinois, supra*, p. 453.

If the legislature can vest the right to maintain a bridge obstructing navigation at a fixed height regardless of subsequent changes in the stream, or in vessels or commerce, it can thereby perpetually destroy the navigation of an entire stream and stifle the growth of the State.

This is aptly illustrated by the present case. In the forty-six years that have elapsed since the bridge was

built substantial changes in the channels and water levels may have taken place. Navigation may now have a different aspect through increase in tonnage and value, the variety of commodities transported, and the character of vessels employed. The art of bridge building may have rendered feasible structural changes which would have been unreasonable fifty years ago. Yet the bridge company insists upon its right of renewal in its original form as often as need be, and, unless compensated, to maintain the bridge forever constricting the river. The legislature could not have endowed this obstruction with immortality. It can not create a perpetual nuisance.

It is no answer to say that the bridge can be removed upon compensation duly made. The defense of the public interests can not be thus crippled by necessity for payment.

**4. There is nothing in Monongahela Navigation Co. v. United States, 148 U. S. 312, militating against this argument.**

The case referred to has been said to rest upon estoppel. *Lewis Blue Point Oyster Co.* v. *Briggs*, 229 U. S. 82, 89; *Greenleaf Lumber Co.* v. *Garrison*, 237 U. S. 251, 264, 265. In these cases the Federal right to remove, without compensation, structures erected in navigable water was sustained and the Monongahela Navigation case was distinguished on the ground of estoppel.

An estoppel against the Government seems anomalous, and a study of the case will show that the estoppel referred to does not prevent Congress

from legalizing a structure at one time and subsequently declaring it an obstruction, but only from saying that it is a nuisance and at the same time *preserving it for use by the Government.*

The Navigation Company, under a Pennsylvania charter, constructed locks and dams in the Monongahela River. The stream, hitherto only navigable for small boats and during certain seasons of the year, was rendered open to large steamers at all seasons. The corporation collected tolls for the use of the locks. Subsequently Congress provided that certain Federal improvements in the river should not be made "until the Monongahela Navigation Company shall have undertaken in good faith the building of Lock and Dam Number Seven." This lock and dam was thereupon built and put into operation. Congress, however, later decided that this lock should be operated by the Federal Government free of toll charges and its expropriation was authorized by Congress; but it was provided that, in the estimate of the sum to be paid for the lock, the franchise of the company to collect tolls should be excluded. (25 Stat. 400, 411.)

This proviso was held unconstitutional. The company had a valid State charter; the lock had been erected on the invitation of Congress; an inseparable part of the property right in the lock was the franchise to take tolls; and that right was protected by the Fifth Amendment. The Government appropriated this facility for improving navigation and without destroy-

ing, maintained it in its original use. The court said (p. 337):

> It should be noticed that here there is unquestionably a taking of the property, and not a mere destruction. It is not a case in which the Government requires the removal of an obstruction. What differences would exist between the two cases, if any, it is unnecessary here to inquire. All that we need consider is the measure of compensation when the Government, in the exercise of its sovereign power, takes the property.

*Bridge Company* v. *United States*, 105 U. S. 470, was distinguished upon this ground.

The difference is not so much between taking and destroying (as is urged in appellant's brief, p. 23) but rather a distinction between property that has become offensive and property that is not; i. e., the difference between the appropriation of a facility for navigation and the removal of an obstruction to navigation. One involves the abatement of a nuisance, the other the taking of the unoffending property of an innocent owner.

The element of estoppel in the Monongahela case prevented Congress from proceeding on the theory that the lock was an obstruction and the franchise valueless. As long as it preserved the property for its own use it could not compel uncompensated appropriation on the subterfuge that the property was offensive. In the present case there is no such inconsistent action, for the estoppel

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cannot operate to prevent Congress from declaring that property which may have previously been legalized, is now a nuisance.

## III.

### CONGRESS ACTING THROUGH THE SECRETARY HAS DECLARED THAT THE OHIO FALLS BRIDGE IS A NUISANCE.

The legislature has plenary power to declare what constitutes a nuisance. *Reinman* v. *Little Rock*, 237 U. S. 171. This principle is extended to congressional jurisdiction over navigable water. In *United States* v. *Chandler Dunbar Co.*, 229 U. S. 53, 64, this court said:

> So unfettered is this control of Congress over the navigable streams of the country that its judgment as to whether a construction in or over such a river is or is not an obstacle and a hindrance to navigation is conclusive.

This control is nondelegable. But Congress does not have to investigate every case of an obstruction. It may adopt the findings of an executive officer. This was accomplished by section 18 of the act of March 3, 1899. In *Union Bridge Co.* v. *United States*, 204 U. S. 364, 386, this court said:

> By the statute in question Congress declared in effect that navigation should be freed from unreasonable obstructions arising from bridges of insufficient height, width of span, or other defects. It stopped, however, with this declaration of a general rule and imposed upon the

> Secretary of War the duty of ascertaining what particular cases came within the rule prescribed by Congress, as well as the duty of enforcing the rule in such cases. *In performing that duty the Secretary of War will only execute the clearly expressed will of Congress.* * * * (Italics ours.)

In *Monongahela Bridge* v. *United States*, 216 U. S. 177, 195, there was added:

> * * * For Congress intended by its legislation to give the same force and effect to the decision of the Secretary of War that would have been accorded to direct action by it on the subject.

The appellant's contention (brief, pp. 65 *et seq.*) that there has been no legislative declaration that this bridge is an obstruction is therefore baseless. There is the finding to that effect by the Secretary, which Congress accepts by giving him power to order a removal and by rendering nonremoval a crime. What was at first an obstruction *in fact*, thus becomes an obstruction in intendment of law. There is, therefore, direct legislative action by Congress, and as a necessary result, a repeal of all previous congressional declarations inconsistent therewith.

## IV.

### THE ORDER OF THE SECRETARY OF WAR IS NOT ARBITRARY AND ITS ENFORCEMENT INVOLVES NO INJUSTICE.

The order indicates every consideration for the interest of the bridge company. An opportune time was chosen for its issuance, when wear and tear had

made rebuilding the superstructure essential. The object was not to destroy the company's franchise, but merely to reform the bridge to the needs of navigation. Its present unfitness is demonstrated by the fact that its largest span is but 380 feet, and yet by act of February 14, 1883 (22 Stat. 414), Congress required that every bridge across the Ohio have a channel span of at least 500 feet. But any doubts as to the correctness of the findings of the Secretary of War are resolved by the stipulation that his order complies in full with the act of March 3, 1899. (R. 9.) Though the evidence taken at the public hearing does not appear in the record, presumptively it was sufficient to support the Secretary's action. It is not attacked, nor could it be in the face of the stipulation. The bridge therefore is now in fact and law an unreasonable obstruction to navigation.

The stipulation that navigation has decreased in the river since 1880 is not pertinent. It fails to take into account the possible increase in commerce on the river in the ten years next after the erection of the bridge, which may have demanded larger vessels and passages. Moreover, it is admitted that the later decrease in river commerce has been directly occasioned by its transfer to the canal. Traffic may at any time return to the river which should be kept available to insure against canal failure. Finally, the canal as well as the river is spanned by the bridge and of the two modifications ordered by the Secretary, one is to facilitate navigation of the canal. Even if only that part of his order be valid, the com-

pany should not be permitted to rebuild the bridge in *total* defiance of the order.

Counsel (brief, pp. 46, 68) stresses the wording of the fourth stipulation in the agreement of facts. It reads as follows (R. p. 10):

> Since the completion of said bridge in February, 1870, it has been in constant use as a railroad bridge, and it is now necessary that the superstructure of said bridge be renewed. The renewal, however, of this superstructure will not in any way obstruct navigation *any further than the existing bridge* does at present, and *has done for forty-six years past.* (Italics appellant's.)

He insists that the words last italicized show that the bridge is now no more an obstruction to river commerce than it was when built. It is submitted that this is an unwarranted interpretation. This stipulation refers solely to the plan of reconstruction of the superstructure. It aims to show that the renewed bridge will not obstruct navigation *more* than has the existing bridge. This evidently refers to the physical structure of this bridge, showing that inherently it will be no more an obstruction than it ever has been. It does not refer to the amount of navigation, which by increasing, though there had been no change in the bridge's structure, might yet render it extraneously a much greater obstruction. There might be more to be obstructed though not more to obstruct.

But at best, the interpretation of the appellant is immaterial. By stipulation it is conceded that the Secretary of War complied with section 18 of the act of 1899, and this, as has been shown, is the declaration by Congress, binding on the court, that the bridge is now an unreasonable obstruction. If the bridge is no more an obstruction now than it formerly was, it must have been an unreasonable obstruction when erected. Its legalization is now withdrawn.

As erected, this bridge was necessarily an actual or potential obstruction to navigation. If an actual obstruction when erected, it remains so. If potential merely, its potentiality has taken effect in the half century since its erection, and the bridge now throttles the river commerce. The control of Congress over navigable waters must be sufficient to prevent this, and the free exercise of that control must be unhampered by considerations of compensation.

## CONCLUSION.

The decree of the district court should be affirmed.

WM. WALLACE, JR.,
*Assistant Attorney General.*

DECEMBER, 1916.

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